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No. 85-1425

IN THE
Supreme Court of the United States
October Term, 1985

REPUBLICAN PARTY OF HAWAII, TORAKI MATSUMOTO AND RUDY PACARRO,

Appellants,

vs.

PATSY MINK, MARILYN BORNHORST and RAYMOND K. PUA, CITY CLERK, CITY AND COUNTY OF HONOLULU,

Appellees.

Appeal From The Supreme Court Of The State Of Hawaii

MOTION OF APPELLEES PATSY MINK AND MARILYN BORNHORST TO DISMISS OR AFFIRM

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Appellees Patsy Mink and Marilyn Bornhorst move this Court to dismiss the Appeal herein as moot, or in the alternative, to affirm the judgment of the Supreme Court of Hawaii on the ground that it is manifest that the Federal questions on which the decision of the cause depends are so unsubstantial as to not require further argument.

I. INTRODUCTION

Appellants Matsumoto and Pacarro are former City Councilmen from the City and County of Honolulu. They were recalled by the voters in a Special Recall Election. They attempted to run in the Special Election to fill the vacancy created by their recall. The Hawaii Supreme Court decided they could not, based upon its construction of the applicable Ordinance.

The Supreme Court of Hawaii's decision rested entirely upon its construction of the word "successor" as used in the Revised Charter of the City and County of Honolulu (hereinafter R.C.H.). The Court interpreted the term "successor" to mean that one could not succeed himself. Thus, this case turns on the Hawaii Supreme Court's construction of a single term used in the R.C.H., purely a matter of State law, and does not present issues which are substantial enough to require review by this Court.

A. Decision Below

In the decision below, the Hawaii Supreme Court construed Section 3-105(b) of the R.C.H. as prohibiting Appellants Matsumoto and Pacarro from running in the election to fill the vacancy created by their recall. Appellants' Jurisdictional Statement Appendix A-1 - A-15. (Hereinafter "J.S. App."). Section 3-105(b) reads:

> *Vacancy in Office* — a vacancy in the office of any councilman shall be filled in the following manner:
>
> • • •
>
> (b) If the unexpired term is for one year or more, the vacancy shall be filled by special election to be called by the council within ten days and to be held within sixty days after the occurrence of the vacancy. At such time, the electors of the district shall elect a successor to fill the vacancy for the remainder of the term. If any special or general election is to be held in the city after thirty days and within one hundred eighty days after the occurrence of the vacancy, then the election shall be held in conjunction with such other election.

J.S. App. A-34.[1] This Ordinance applies to all vacancies, whether created by recall, death, disability or other reason.[2]

The Court's decision that Section 3-105(b) of the Charter prevents Appellants from running in the Special Election is purely a matter of defining state law. The Court ruled that the word "successor", as used § 3-105(b), is "one who takes the place of another." J.S. App. A-6.

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1 The full text of Section 3-105(b), as well as other constitutional provisions, statutes and charter provisions are contained in the Appendix to the Appellants' Jurisdictional Statement which is incorporated herein by reference.

2 The recall procedures of the City and County of Honululu provide for a three step procedure: 1) verified petitions asking for recall of the councilmen, signed by ten percent (10%) of the registered voters must be submitted to the City Clerk's Office. (R.C.H. Section 12-103, J.S. App. A-35 - A-39); 2) a recall election is held whereby the councilman runs unopposed, with his constituents voting for or against recall — only if a majority votes to recall the councilman is he recalled. (R.C.H. Section 12-103, J.S. App. A-35 - A-39); and 3) if the voters recall the councilman, a Special Election is held to elect his "successor". (R.C.H. 3-105(b)).

In other words, a person cannot succeed himself. A recalled councilman cannot run for the same office again in the *Special* Election called to fill his own vacancy. Appellants are free to run for any other office, and they can run for the same office again in the *regular* election. But the Supreme Court of Hawaii ruled that they cannot be their own "successors" under the provisions of this Ordinance. J.S. App. A-6-A-8.

The Court then held that this construction of Section 3-105(b) of the Charter does not violate the First and Fourteenth Amendments of the United States Constitution. Employing the test established by this Court in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), the Court held that there was no character or magnitude to the Appellants' asserted injury because the Appellants ran for office, knowing that they could be recalled. J.S. App. A-11. Secondly, securing the electorate's right to recall councilmen by majority vote for whatever reason deemed appropriate is paramount to the burden placed upon the Appellants. J.S. App. A-12. And, lastly, the Court held that disqualifying a recalled public official from running in the election to fill the seat vacated by his recall is a necessary step to accomplish the Charter's goal of allowing the citizens to decide whether to recall a councilman. J.S. App. A-13 - A-14.

B. Relief Appellees Request

Appellees request that this Court dismiss the Appeal as moot because the Special Election in which Appellants Pacarro and Matsumoto sought to run was held on December 28, 1985. Two new councilmen have assumed Mr. Pacarro's and Mr. Matsumoto's former offices. The *reg-*

ular election for a new term to these same offices is scheduled for September, 1986. At that time, both Mr. Matsumoto and Mr. Pacarro can run for their former offices.[3] Therefore, by the time this Court decides whether it has jurisdiction and the case is fully briefed and argued, the Court's ruling will have no effect whatsoever — even if Appellants are successful. The most this Court could do is order that another election be held to allow Appellants to run for their former offices. There is already such an election scheduled for September 1986, so this Appeal is unnecessary and should be dismissed as moot.

Alternatively, Appellees request that the decision of the Hawaii Supreme Court be affirmed because there is no substance to the Federal claims presented by the Appellants. The decision of the Hawaii Supreme Court was based upon its construction of Section 3-105(b) of the Charter, purely a matter of state law which this Court is powerless to review. Appellants' attempt to turn the decision into a constitutional case is clearly misplaced. The restriction upon access to the ballot created by the Hawaii Supreme Court's decision is miniscule. It prohibits only one person — the former office holder — from running for

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[3] In a related issue, but in a different lawsuit, Appellants Matsumoto and Pacarro successfully challenged restrictions in the Honolulu City Council which would have prevented them from holding *any* City or County office for two years following their recall. *Matsumoto, et al. v. Pua,* No. 85-0950 (D.Haw. filed Mar. 3, 1986). Appendix, *infra,* pp. A-1-A-9. (Hereinafter "App. A"). The Ninth Circuit found this restriction was unconstitutional. That question is not before this Court. This lawsuit concerns only the validity of the Hawaii Supreme Court's opinion on the meaning of the word "successor".

one office — his former office from which he was recalled, in one election — the Special Election to fill the vacancy created by his recall. This minimal limitation of access to the ballot is required to give substance to the electorate's right to recall an elected official by majority vote. Thus, under this Court's balancing test developed in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), prohibiting Appellants from running in the Special Election is not an unconstitutional infringement of their First and Fourteenth Amendment rights.

II. MOTION TO DISMISS

A. This Court Will Not Decide A Claim That Is Moot

It is well settled that this Court will not decide questions when a decision cannot affect the rights of the particular litigants before the Court. *De Funis v. Odegaard,* 416 U.S. 312 (1974); *North Carolina v. Rice,* 404 U.S. 244 (1971). Where, as here, the question has become moot due to subsequent developments which are no fault of the parties, the appeal will be dismissed as moot. *Flast v. Cohen,* 392 U.S. 83 (1968). The prohibition against this Court entertaining jurisdiction over appeals which are moot is based on Article III of the Constitution which limits the exercise of Federal judicial power to actual cases or controversies. *Powell v. McCormack,* 395 U.S. 486 (1969); *Liner v. Jafco, Inc.,* 375 U.S. 301 (1964). This Court must make its own determination of whether the case is moot at the time it considers the case, not at the time the action is filed. *De Funis,* 416 U.S. at 316; *Roe v. Wade,* 410 U.S. 113, 125 (1973).

B. The Case Is Moot Because Appellants Can Run For The Offices They Seek In September Of 1986

Although the relief Appellants request is unclear, it appears that they seek to run in a new election for their old council seats. They already have that right. The Appellants can run in the General Election to be held in September of 1986, five months from now. There is absolutely nothing this Court can do to grant Appellants any speedier relief than they already have. Thus, there is no reason for the United States Supreme Court to disrupt the electorial process of the City and County of Honolulu.

C. The Occurrence Of The Special Election In Which Appellants Sought To Run Makes This Case Moot

The occurrence of the Special Election in which Appellants sought to run is an intervening event making this case moot.

Brockington v. Rhodes, 396 U.S. 41 (1969), is controlling in this case. In *Brockington,* this Court held that a suit challenging the validity of Ohio's seven percent (7%) signature requirement for independent candidates to appear on the ballot for the House of Representatives was moot because of the intervening occurrence of the 1968 election in which Brockington sought to run. Brockington had filed a mandamus petition in state court challenging the validity of the signature requirement as it applied to him in this one election. The writ was aimed *solely* at placing his name on the ballot in the 1968 election. Because Brockington requested very limited relief, did not represent a class and did not request a declaratory judgment, the Court found it impossible to grant him the lim-

ited, extraordinary relief requested and dismissed the claim as moot.[4]

The facts of this case are almost identical to those in *Brockington*. Appellants sought only a very limited form of relief — that the writ of mandamus be denied so that they could run in one specific election. As in *Brockington*, due to the occurrence of the election, there is nothing that this Court can do to offer the Appellants any effective relief, even if Appellants were to prevail.

D. This Case Is Not "Recurring, Yet Evading Review"

The "recurring, yet evading review" exception to the mootness doctrine is applicable only where there is a "reasonable expectation that the complaining party will be subjected to the same injury." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Appellants' suggestion that: "This Candidacy case is truly 'capable of repetition, yet evading review'" (Appellants' Jurisdictional Statement, at 22), does not meet this standard. To be subjected to the same injury, Appellants must show that they intend to run again, will be elected, will be recalled, and will be barred from running to fill the vacancy created by their recall.

And if the events in this case were to recur, there would be a much greater likelihood of the case being reviewed. First, the Supreme Court of Hawaii has already expressed its opinion on the matter and, consequently, there would be only a slight delay before the matter came up for

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[4] This Court has reached similar holdings in other election cases. *Cousins v. Wigoda*, 409 U.S. 1201 (1972); *Mills v. Green*, 159 U.S. 651 (1895).

review by this Court. Secondly, much of the problem in this case is that Mr. Pacarro and Mr. Matsumoto were recalled only 15 months before the expiration of their term. Had they been recalled earlier, this case could have been fully litigated in time to offer Appellants effective relief. And, lastly, future office holders subject to the ban on running could bring a claim for declaratory relief or a class action. Both would keep the claim alive.

The election cases in which this Court has applied the "capable of repetition, yet evading review" doctrine to hold that the case is not moot after an election has occurred are distinguishable on the four grounds found controlling in *Brockington*: (1) Appellants do not allege they will be subjected to the same injury; (2) Appellants are not maintaining a class action on behalf of themselves and other elected officials, present and future;[5] (3) Appellants are

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[5] The case of *Brown v. Chote*, 411 U.S. 452 (1973), can be distinguished because it involved a class action brought by the candidate and the other candidates, present and future. This created a much greater likelihood that one of the plaintiffs would be subjected to the same harm in the future. *Dunn v. Blumstein*, 405 U.S. 330 (1972), can be distinguished because it involved a class action brought by a voter on behalf of himself and other voters similarly situated. Although in *Moore v. Ogilvie*, 394 U.S. 814 (1969), the complaint was not filed as a class action suit, there were 25 named plaintiffs. This created a great likelihood that one of them would be subjected to the same harm in the future if he decided to run again.

not suing for themselves and their supporters;[6] and (4) Appellants did not seek a declaratory judgment from the Hawaii Supreme Court.[7] *See Brockington v. Rhodes,* 396 U.S. at 43.

Based on the arguments and authorities above, this case is now moot and should be dismissed as not presenting a case or controversy.

III. MOTION TO AFFIRM

In the alternative, Appellees Mink and Bornhorst submit that the issues raised by Appellants in their Jurisdictional Statement are so unsubstantial as to not require full review by this Court.

A. The Decision Of The Hawaii Supreme Court Rests Entirely Upon State Grounds

The decision of the Hawaii Supreme Court rests entirely upon its construction of Section 3-105(b) of the

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[6] The following cases can be distinguished from the case at bar because the candidate brought an action on behalf of himself and others situated like him as voters. *Anderson v. Celebrezze,* 460 U.S. 780 (1983); *American Party of Texas v. White,* 415 U.S. 767 (1973); *Storer v. Brown,* 415 U.S. 724 (1974); *Brown v. Chote,* 411 U.S. 452 (1973).

[7] A declaratory judgment extends its benefits to those situated similarly to the plaintiff even if not formally in a certified class with him. The following cases can be distinguished from the present one because the complaint requested a declaratory judgment as well as injunctive relief. *Anderson v. Celebrezze,* 460 U.S. 780 (1983); *Democratic Party of the United States v. Wisconsin,* 450 U.S. 107 (1981); *Fishman v. Schaffer,* 429 U.S. 1325 (1976); *American Party of Texas v. White,* 415 U.S. 767 (1973); *Storer v. Brown,* 415 U.S. 724 (1974); *Brown v. Chote,* 411 U.S. 452 (1973); *Dunn v. Bloomstein,* 405 U.S. 330 (1972); *Moore v. Ogilvie,* 394 U.S. 814 (1969).

Charter. This is a local Charter enacted by the people of the City and County of Honolulu. The Supreme Court of Hawaii has construed this provision of the Charter as banning a recalled councilman from running in the Special Election to fill the vacancy created by his own recall. Because the decision rests upon state grounds, this Court is powerless to review the decision, except insofar as it deals with Federal constitutional rights. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909).

B. The Ban On Allowing Appellants To Run In The Election To Fill Their Vacant Seats Does Not Violate The First And Fourteenth Amendments Of The United States Constitution

As Justice Rehnquist noted in denying the Stay in this very case, there is a "presumption of constitutionality accorded to state and local laws . . ." App. A-11.

Pursuant to the holding of this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Hawaii Supreme Court examined the character or magnitude of the asserted injury, the interest of the City and County in justifying the burden placed upon the Appellants by being banned from running in the Special Election and the necessity of the ban to accomplish the alleged public interest.

Significantly, the majority of this Court in *Anderson* found that the state's interest in political stability is sufficient to vindicate a statute prohibiting a defeated candidate in a party primary from running as an independent. 460 U.S. at 783. The Charter provision now challenged is much closer to the statute upheld in *Anderson* than the one struck down.

There is little, if any, character or magnitude to the injury which Appellants assert. The Appellants *did* have a chance to run for the remainder of their term—they ran unopposed in the Recall election and lost.[8] Thus, Appellants Pacarro and Matsumoto were indeed able to run for the unexpired portion of their term. More importantly, without the two year ban on running for city offices, Appellant may now seek any office they wish — including their old council seats which are up for election in September of 1986. To suggest that Section 3-105(b) presents a significant abridgment of Appellants' constitutional rights is illegitimate.

Secondly, the interest indicated by the Hawaii Supreme Court of assuring the citizens' right to recall a city councilman by majority vote in a recall election, is of paramount interest to the Appellants' interest. The Court did not come up with this government interest *sua sponte;* rather, this interest was argued considerably in the Emergency Petition for Writ of Mandamus. (*See* Emergency Petition For Writ Of Mandamus, at 5 and 17).

As the Hawaii Supreme Court noted, it would clearly frustrate the will of the majority that recalled the councilman if a plurality could then put him back in office for the remainder of his term.

Lastly, disqualification is necessary to assure that the electorate has an effective voice in deciding whether to recall the councilman. Obviously, precluding the council-

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[8] Appellants' knowledge that they could be recalled, while not waving their right to contest the constitutionality of Section 3-105(b), certainly diminishes the weight of their claim.

man from running to succeed himself is necessary to achieve this end. Because lack of primary and special elections often results in a winner being chosen by plurality, a ban on running is necessary to assure that the recall is effective. As the Supreme Court of Hawaii noted, the process of recall by a majority and election by plurality could take place several times during a councilman's term if Appellants' view is accepted. J.S. App. A-13 - A-14.

C. The Hawaii Supreme Court's Construction Of Section 3-105(b) Of The Charter Does Not Contravene The Injunction Of The U.S. District Court

Appellants mistakenly read the prohibition against running in an election to fill the vacancy created by one's own recall (in Section 3-105(b) of the R.C.H.) as being dependent upon the two year ban on running which was recently found unconstitutional. Nothing could be further from the truth. A ban on running to fill the vacancy created by one's own recall does not depend on the two year ban for seeking any city office for two years after being recalled.

The two provisions are separate and independent parts of the Charter. Whether the two year ban on running for any office after recall is unconstitutional has no effect on whether the Hawaii Supreme Court's construction of the word "successor" as used in § 3-105(b) is unconstitutional. The Hawaii Supreme Court's interpretation of the Charter, therefore, does not contravene the injunction which the United States District Court for the District of Hawaii which was directed at the two year ban on running of Section 12-103 of the R.C.H.

D. The District Court Properly Refused To Exercise Jurisdiction

Contrary to Appellants' claim, the issue of the constitutionality of the ban on Appellants running to fill the vacancy created by them was fully litigated before, and decided by the Supreme Court of Hawaii. If it were not, Appellants would have no basis for a direct appeal to this Court.

1. The Decision Of The Hawaii Supreme Court Has Res Judicata And Collateral Estoppel Effect

In *England v. Lousiana Medical Examiners,* 375 U.S. 411 (1964), this Court developed the following abstention doctrine rule applicable to this case:

> . . . [I]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then — whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court.

Id. at 419.

In this case, Appellants lost their right to return to the District Court by litigating their constitutional claims in state court. The possible infringement upon access to the ballot and the *Anderson v. Celebrezze,* 460 U.S. 780, standards were addressed by Appellants in their Memorandum in Support of the Motion to Dismiss the Emergency Petition for Writ of Mandamus and at oral argument.

On these facts, the District Court and Court of Appeals correctly held that Appellants' only avenue of appeal is to this Court.

2. Even If The Appellants Did Not Have A Fair Opportunity To Litigate Their Constitutional Claims, Their Only Remedy Is By Writ of Certiorari

The District Court for the District of Hawaii, as well as the Ninth Circuit Court of Appeals, have held that the constitutional issue was properly addressed by the Hawaii Supreme Court and that the decision, therefore, has collateral estoppel effect. J.S. App. A-26 - A-29. If Appellants wish this Court to review these decisions, they must file a Petition for Writ of Certiorari of the Ninth Circuit decision. They have not done so. Appellants' request that this Court hold that the District Court has jurisdiction over the matter should therefore, be dismissed without argument.

VI. CONCLUSION

Appellants are attempting to use this Court as an appellate court with general powers to review all decisions of a state's highest court. It is not. This Court should decline to accept jurisdiction over the present Appeal not only because this action is now moot, but also because the Federal issues presented by the Appeal are so lacking in substance that the decision of the Hawaii Supreme Court should be summarily affirmed.

The occurrence of the Special Election in which Appellants sought to run makes this case moot. The Appellants requested only that they be allowed to run in the Special Recall Election to fill the vacancy created by their own recall. They did not represent a class and did not request a declaratory judgment. Because Appellants can run for their former seats in the September of 1986 Gen-

eral Election, there is no remedy this Court can fashion which Appellants do not already have.

In the alternative, the decision of the Hawaii Supreme Court should be affirmed. The Hawaii Supreme Court's construction of Section 3-105(b) of the Charter presents only a slight infringement upon the Appellants' access to the ballot — they cannot run to fill the vacancy created by their own recall. The Supreme Court of Hawaii properly found that such a construction of the Charter was necessary to assure that the citizens' right to recall an elected official is properly honored. Under this Court's balancing test in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), prohibiting a recalled councilman from running for the unexpired portion of his term is constitutional.

Wherefore Appellees Mink and Bornhorst respectfully submit that the question upon which this cause depends is not only moot, but also so unsubstantial as not to need further argument. Appellees therefore respectfully move this Court to dismiss this Appeal or, in the alternative, to affirm the judgment entered by the Supreme Court of Hawaii.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 85-0950

TORAKI MATSUMOTO, et al.,

Plaintiffs,

vs.

RAYMOND K. PUA, City Clerk,
City and County of Honolulu,

Defendant,

and

DEMOCRATIC PARTY OF THE
STATE OF HAWAII, JAMES KUMAGAI,

Intervenors-Defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR DECLARATORY AND PERMANENT INJUNCTIVE RELIEF

(Filed March 3, 1986)

With this order, a lengthy and complex legal battle finally comes to an end. The process began in the political arena plaintiffs Toraki Matsumoto, George Akahane and Rudy Pacarro switched from the Democratic to the Republican Party. A campaign was quickly initiated by various members of the Democratic Party to recall the councilmen.

Under Article XII, Section 12-103 of the Revised Charter of the City and County of Honolulu (hereinafter referred to as the "RCH"), if ten percent of the voters who participated in the last election sign a recall petition, the council member must either submit to a recall election or

resign. If the council member resigns or is defeated, he or she is thereafter prohibited from running for or being appointed to a city post for two years. An official may be recalled for any or no reason.

On October 5, 1985, Councilmen Toraki Matsumoto, Rudy Pacarro and George Akahane were recalled. A special election was scheduled, and the recalled councilmen attempted to place their names upon the ballot. City Clerk Raymond Pua refused, citing RCH 12-103. These councilmen and eight other voters in their districts moved for a temporary restraining order to require Pua to place the names of Matsumoto, Akahane and Pacarro on the ballot for the special election. The plaintiffs argued that the two year penalty was unconstitutional.

On October 15, 1985, Senior Judge Samuel P. King and Senior Judge Martin Pence denied the motion for injunctive relief. On October 18, 1985, Chief Judge Harold Fong filed his dissent. On October 28, 1985, the Ninth Circuit reversed the majority decision with regard to the two year penalty provision, and remanded the case to district court. On the same day, pursuant to the Ninth Circuit's decision, Judges Fong and Pence filed an order granting the preliminary injunction. Judge King recused himself from further consideration in the case.

On November 26, 1985, without addressing the two year penalty provision, the Hawaii Supreme Court held that pursuant to RCH § 3-105, the plaintiffs were barred from running in the special election. *Mink v. Pua,* No. 10998 (Hawaii 1985). On December 4, 1985, this court denied the plaintifffs' motion for summary judgment which would have effectively overruled the Hawaii Supreme Court's opinion. The state order is currently on appeal to the United States Supreme Court.

On January 10, 1986, the plaintiffs filed the present motion for declaratory and permanent injunctive relief. On February 14, 1986, the defendants filed statements of no opposition to the motion.

I. APPOINTIVE POSITIONS

The plaintiffs seek declaratory judgment as to the two year ban on both elective as well as appointive positions. The court finds that the issue of appointive positions is not a proper issue of adjudication. First, the issue is not yet ripe. The plaintiffs have presented no evidence that appointive positions are being denied because of the two year ban. Although Mayor Frank Fasi has apparently offerred a position to Akahane, there is no evidence of any action by third parties preventing Akahane from accepting. The court will refrain from deciding abstract issues or giving advisory opinion. Therefore, without a showing that the plaintiffs are being denied appointive positions, the issue is not yet ripe for adjudication.

Second, the present defendants have no authority to deny appointive positions. Therefore, they have little motive to litigate the issue of appointive positions. Furthermore, an injunction against the present defendants provides no effective relief. Because of the lack of an adversarial setting and because an injunction will not provide any effective relief, that issue is not proper for adjudication with these parties.

II. ELECTIVE POSITIONS

Under RCH 12-103, Pua may not place the plaintiffs' names on the ballot for the general election, absent a court order. Therefore, the two year penalty provision is pre-

venting the plaintiffs from running in the 1986 general election. In determining whether the penalty provision is unconstitutional, the court must consider both the First Amendment as well as the Equal Protection Clause.

Candidacy restrictions implicate First Amendment rights of voters as well as candidates. Many voters can only assert their political preferences by voting for candidates, joining political parties, or both. *Lubin v. Panish,* 415 U.S. 709, 716 (1974). "The exclusion of candidates from the ballot infringes on the voters' freedom of association because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Anderson v. Celebrezze,* 460 U.S. 780, 788-89 (1983).

Furthermore, the right to equal access in voting is a fundamental one. *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966). A restriction on candidacy may heavily burden the fundamental right to vote. *Lubin v. Panish,* 415 U.S. at 716. However, "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." *Bullock v. Carter,* 405 U.S. at 143. Each case must be viewed under its peculiar facts and circumstances. *Storer v. Brown,* 415 U.S. 724, 730 (1974).

A. *The Appropriate Standard*

In two recent decisions, the Supreme Court has set forth the appropriate standard of review in candidate access cases: *Clements v. Fashing,* 457 U.S. 957 (1982) and *Anderson v. Celebrezze,* 460 U.S. 780 (1983).

Both cases dealt with the issue of candidacy restrictions and voter rights, and both cases applied some type of balancing test. *Anderson* is the most recent Supreme Court pronouncement on the issue and commands a majority of the court, whereas *Clements* garnered only a plurality. Therefore, the court will apply the *Anderson* test.

In *Anderson,* an Ohio statute required an early filing deadline for independent candidates in the presidential general election. John Anderson ran for president on an independent ticket, and was unable to garner sufficient signatures within the short amount of time provided for in the Ohio statute. The law was challenged as an unconstitutional deprivation of Anderson supporters' First Amendment rights.

In passing upon the constitutionality of the Ohio statute, the Supreme Court set forth the following balancing test:

> [The court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. at 789.

In applying the *Anderson* balancing test, the court must consider the character and magnitude of the injury

asserted by the plaintiffs, the nature of the city's interests, and the necessity of the restrictions to achieving the city's goals.

B. *The Character and Magnitude of the Asserted Injury*

The city council members were recalled without any showing of malfeasance, misfeasance, or nonfeasance. As an expression of their freedom of speech, the voters have this right to decide arbitrarily who will represent them. *See, e.g., Gordon v. Leatherman,* 450 F.2d 562, 567 (5th Cir. 1971).

The candidates, however, have not been merely recalled, but have also been prohibited from holding elective city office for two years. Thus, a majority of the voters is allowed to exclude candidates based upon political preferences. The infringement upon the First Amendment is exacerbated by the fact that the exclusion of the plaintiffs was apparently based upon the councilmen's decision to change political parties. The penalty provision, therefore, substantially burdens the councilmen's First Amendment rights.

The penalty provision likewise burdens the constituents' right to vote for the candidate of their choice. The right of a voter to support a candidate of his or her choice is an important interest to be protected. *Anderson,* 460 U.S. at 787. Furthermore, the recall of a councilman does not necessarily imply that a majority of the voters will not consider the official to be the most suitable of the candidates in the next election. The right of the people to maintain a flexible and evolving decision-making process

is another significant interest which is burdened by the penalty provision. *See, e.g., De Bottari v. Melendez,* 44 Cal. App. 3d at 921.

C. *The Asserted Interests of the City*

The intervenors have previously suggested that the city has the right to insure that its officials are open, honest, and responsive to their constituents. They argued that the present plaintiffs have broken a covenant to the voters, and that such a breach requires retribution. Although the defendants no longer oppose the motion for declaratory relief, the arguments should be addressed.

The court finds that the record is devoid of any evidence that the voters recalled their respective councilman for a breach of covenant. Any breach of covenant was not to the voters, but more likely to the political party of the councilmen's former affiliation. Under the present circumstances, the city has no particular interest in enforcing party discipline.

The city clearly has a legitimate interest in insuring that its officials are responsive to their constituents. The issues remaining, however, are whether the interest is achieved through the penalty provision, and whether the city's interest outweighs the interests of the candidates and voters.

D. *The Necessity of the Restriction to the City's Goals*

The penalty provision is unnecessary to achieve the city's asserted goals.

A recall election, and even the threat of such an election, is sufficient to achieve the necessary accountability. Undergoing a recall election can have drastic professional and financial consequences for a public official. Forcing an elected official to undergo such an ordeal solely to retain his or her position, a position which was earned only after battling through a general election, is sufficient to ensure that a public official is responsive to his or her constituents once elected.

The penalty provision does not significantly add to this substantial deterrent effect. The only significant effect of the penalty provision is to restrict the field of candidates from which the voters can select the representative of their choice. If the recalled official is believed to be irreparably unresponsive to his constituents, then he or she will not succeed in the general election and the penalty provision would therefore be unnecessary. If the recalled official were to succeed in the general election, that would be absolute proof that the voters consider the candidate to be a responsive official, and the penalty provision would unnecessarily burden the constituents' First Amendment rights. The voters are the best judges of the accountability of the recalled official.

The court further notes that few other states or counties have similar penalty provisions in their recall statutes. *See* First Supplemental Memorandum of Defendant Raymond K. Pua (filed October 10, 1985). One could infer that few other legislatures have found a need to impose a similar penalty to achieve the same goals.

Finally, the court finds it unusual that a recalled official is subject to a two year penalty provision, whereas an

impeached official is not. If it is unnecessary to bar an official who is impeached for malfeasance, it should also be unnecessary to bar an official who is recalled for changing political affiliations.

Because the penalty provision is unnecessary to achieving the goals asserted by the city, and because those goals can be achieved solely through the less restrictive recall provision, the court finds that the two year penalty provision unconstitutionally burdens significant First Amendment freedoms of both voters and recalled officials.

Accordingly, IT IS HEREBY ORDERED that the plaintiffs' Motion for Declaratory Relief and Permanent Injunction is DENIED with respect to the issue of appointive positions, and GRANTED with respect to the issue of elective positions.

DATED: Honolulu, Hawaii, March 3, 1986.

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

MATSUMOTO v. PUA,
CIVIL NO. 85-0950

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR DECLARATORY AND PERMANENT INJUNCTIVE RELIEF

File Name: A-428

No. A-428 — *Republican Party of Hawaii v. Patsy Mink, et al.*

JUSTICE REHNQUIST, Circuit Justice.

Appellants, two recalled city councilmen of the city of Honolulu and the Republican Party of Hawaii, ask me to stay an order of the Supreme Court of Hawaii, or to affirmatively enjoin the conduct of appellee Pua, the city clerk of the city of Honolulu. They claim that the following provision of the Honolulu City charter violates the United States Constitution as interpreted by this Court in *Anderson v. Celebrezze,* 460 U.S. 780 (1983):

> "No person, who has been removed from his elected office or who has resigned from such an office after a recall petition directed to him has been filed, shall be eligible for election or appointment to any office of the city within two years after his removal or resignation."

Appellants Matsumoto and Paccaro were recalled in an election held October 5. They seek to run in a special election called to fill the vacancies caused by the recall which is scheduled for tomorrow, Saturday, November 30. The stay application was presented to me about 1 p.m. Eastern Standard Time today, Friday, November 29. The Court of Appeals for the Ninth Circuit concluded that the ordinance as it construed it was unconstitutional, but the Supreme Court of Hawaii has now adopted a narrowing construction, which nonetheless prevents Matsumoto and Paccaro from appearing on the ballot, and ordered the city clerk to enforce the statute in tomorrow's election.

It is almost impossible in the length of time available to me to ascertain whether four Justices of this Court would vote to note probable jurisdiction of an appeal from the decision of the Supreme Court of Hawaii, or whether a majority of this Court would be likely to reverse the decision of that court. The City Charter provision as interpreted by the Supreme Court of Hawaii is not, in my judgment, clearly unconstitutional under our decision in *Anderson v. Celebrezze, supra.* Under these circumstances, the "stay equities" of the case and the usual presumption of constitutionality accorded to state and local laws lead me to deny the application.